IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
December 10, 2002 Session

STATE OF TENNESSEE v. CLIFFORD LEON FARRA

Direct Appeal from the Criminal Court for Sullivan County
No. S43,491 R. Jerry Beck, Judge

No. E2001-02235-CCA-R3-CD
December 10, 2003

The defendant, Clifford L. Farra, appeals from his Sullivan County Circuit Court convictions of possession of more than 300 grams of cocaine for resale, a Class A felony; sale of more than 300 grams of cocaine, a Class A felony, merged with the possession conviction; conspiracy to sell or deliver 300 grams or more of cocaine, a Class A felony; possession of more than ten pounds of marijuana for resale, a Class D felony; sale of more than ten pounds of marijuana, a Class D felony, merged with the possession conviction; and conspiracy to sell ten pounds or more of marijuana, a Class E felony. *See* Tenn. Code Ann. §§ 39-17-417 (Supp. 2002) (possession and sales of marijuana and cocaine); 39-12-103 (1997) (conspiracy). After being convicted by a jury, the defendant was sentenced by the trial court as a Range I standard offender to 22 years for possession of more than 300 grams of cocaine, 22 years for conspiracy to possess more than 300 grams of cocaine, three years for possession of more than ten pounds of marijuana, and eighteen months for conspiracy to possess more than ten pounds of marijuana. The two 22-year incarcerative sentences run consecutively, and the other sentences run concurrently for an effective sentence of 44 years. In this appeal, the defendant makes the following allegations:

I. The evidence was insufficient to support the convictions.
II. The trial court erred in failing to properly instruct the jury.
III. The trial court erred in entering convictions on both conspiracies.
IV. The trial court erred in various evidentiary rulings.
V. The trial court erred in proceeding with a juror who testified that the defendant had taken the juror's photo during a trial recess.
VI. The state's proof fatally varied from the allegations of the indictment.
VII. The trial court erred in sentencing.

We reverse and vacate the conviction for conspiracy to sell marijuana but otherwise affirm the lower court's judgment.

Tenn. R. App. P. 3; Judgments of the Criminal Court are Reversed in Part and Affirmed in Part.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JERRY L. SMITH, J., joined.

John D. Parker, Jr., Kingsport, Tennessee (at trial), and Timothy R. Wilkerson, Kingsport, Tennessee (on appeal), for the Appellant, Clifford Leon Farra.

Paul G. Summers, Attorney General & Reporter; Angele M. Gregory, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Joseph Eugene Perrin, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Through undercover and surveillance operations, officers with the Second Judicial District Drug Task Force learned that Jonathan Hamblin and Walter Eugene Mayo were involved in the distribution of large amounts of cocaine and marijuana in Sullivan County. A search of Mayo's residence revealed a bag containing cocaine packets, a Texas receipt for an antifreeze purchase, and a paper bearing truck tire information and the defendant's name. With charges looming over him, Hamblin agreed to assist the task force in an undercover operation to garner evidence against the defendant.

In December 1999, the officers recorded telephone conversations between Hamblin and the defendant, who was an over-the-road truck driver, in which the two discussed a "deal." At trial, the recordings were played for the jury.

On December 29, 1999, the task force provided Hamblin with $20,000 in marked cash and observed as he entered the defendant's home through the back door. After an hour to an hour and a half, the defendant and Hamblin emerged from the house carrying packages wrapped in Christmas paper, which they placed in Hamblin's vehicle. Hamblin left, and the surveillance officers followed him to a motel.

The officers opened one of the packages and found marijuana inside. Another package contained cocaine. One of the boxes from the packages had originally contained a new electric keyboard, a second had contained a pink mechanical pig, and a third had held an electric heater.

The officers executed a search warrant at the defendant's home. Upon entering, they encountered a strong marijuana odor. In the master bathroom, they found large plastic tubs with lids and marijuana residue, a large set of scales on the counter, and marijuana in the scales. The bathtub contained approximately 20 plastic bags filled with marijuana. They also found cigarette rolling papers, a rolling machine, old magazines on marijuana horticulture, and 92 guns, including an M16

rifle. In a ceramic chicken on top of the refrigerator in the kitchen, they found the $20,000 delivered by Hamblin. The officers discovered a pink mechanical pig and an electric keyboard that, respectively, were consistent with two of the wrapped boxes containing drugs that Hamblin had brought to the motel.

The officers found financial records, phone records, and truck business records but found nothing suspicious or irregular about any of them. They found no supplier or buyer lists, no "tote ledgers," and no records of hidden assets. They seized a computer but found no suspicious documents or records on it.

In the defendant's road tractor, the officers' drug dog "alerted" in the area of the sleeper bunk. Underneath the bunk, the officers found a storage space large enough to hold the plastic containers that were found in the bathroom of the house.

In the house, the officers found a key and a rental contract for a storage unit. The officers took the drug dog to the storage unit, and when the dog "alerted" on the unit, they obtained a search warrant. Executing the warrant, the officers used the key from the house, entered the storage unit, and found assembled and unassembled motor scooters and a box containing $60,000 in cash.

Hamblin testified that after his and Mayo's homes had been searched, he agreed to help the task force develop a case against the defendant. Hamblin testified that the defendant had 50 pounds of marijuana and a "kilo" of cocaine for Hamblin to distribute; however, Hamblin would have to pay the defendant $20,000 for the previous release of marijuana to Hamblin before the defendant would release the new shipment to him.[1] On December 29, 1999, Hamblin went to the defendant's house with a cooler containing $20,000 provided by the task force. The defendant met him, and Hamblin left the cooler inside the back door. The defendant retrieved the money from the cooler and gave it to his wife. The Christmas-wrapped drug boxes were on the bed in the master bedroom. Hamblin took them to the motel, where he met the officers.

Hamblin testified that, during the conspiracy time frame, June 1 through December 29, 1999, he received marijuana and cocaine from the defendant on numerous occasions. He saw as much as 200 pounds of marijuana in the defendant's home on one occasion. He had helped the defendant break up bricks of marijuana and repackage it for distribution, and on one occasion he helped the defendant carry drugs from the defendant's truck into his home. To a smaller extent, he helped the defendant repackage cocaine. During the conspiracy period, Hamblin sold approximately 50 to 70 pounds of marijuana that he obtained from the defendant, and during this time frame, Hamblin paid the defendant between $50,000 and $60,000 for sales of cocaine and marijuana. The defendant had mentioned a "scooter" business as a means of laundering money, and the defendant used drug money to buy cars, guns, and coins, and to pay his house mortgage. Hamblin stored the

[1]Some of the previous quantity of marijuana and cash had been seized by the task force in the searches of Hamblin's and Mayo's residences.

drugs at Mayo's residence. Hamblin identified the black bag found in Mayo's residence – containing cocaine, the receipt, and the truck tire information – as belonging to the defendant.

On cross-examination, Hamblin admitted that he had struck a plea bargain with the state in which his pending drug cases would be disposed of via a Range I effective sentence of 20 years to be served at 30 percent. He also admitted that, when first approached by the officers about his role in the drug trade, he told the officers several untruthful stories, including one elaborate lie about "Mafia" involvement.

In closing its case-in-chief, the state presented a chemical analyst who testified that the packages and 18 plastic bags submitted by the task force collectively contained 51.9 pounds of marijuana. Also, some of the packages submitted collectively contained 862.6 grams of cocaine.

The defendant's case-in-chief included testimony of some of the defendant's neighbors, who testified that there were no suspicious "goings-on" at the defendant's house, such as streams of callers or late-night visitors.

The defendant's adult daughter testified that on December 21, 1999, Hamblin left Christmas packages at the Farra house. She testified they were for Hamblin's girlfriend and were being hidden from Hamblin's wife. She testified that her father had long been a gun collector and that she had not smelled marijuana in the home.

Michael Stevenson, a former truck driver who had dispatched the defendant on hauling trips, testified that the defendant was an owner-operator who hauled for K-Mart and Wal-Mart and often drove between Georgia and California. Stevenson testified that truckers carried large sums – as much as $8,000 – for repairs. He said that trips for K-Mart, for instance, were "timed" 95 percent of the time and had preset times for delivery. The defendant received no complaints about being late on his runs. Drug-sniffing dogs were routinely stationed along Interstate 10, which the defendant traveled on his trips. On cross-examination, Stevenson admitted that he was familiar with the defendant's routes and methods during 1997 and the early part of 1998 but did not know about the defendant's practices in 1999.

A Knoxville-based handler of trucking equipment testified that the defendant bought or leased equipment from him from 1994 through 1998 and that the defendant paid his invoices by check. The defendant satisfied the notes on his truck and other equipment, and in August 1999, he leased a motor home at an expense of $1,372 per month.

The defendant's brother, Jody Farra, testified that he had known Hamblin for a number of years and that after Hamblin had experienced financial trouble, he lived in Jody Farra's home for a while. Ultimately, Jody Farra terminated the arrangement because of Hamblin's involvement in the drug trade.

The defendant testified that he had been a truck driver for 32 years and had lived in his current home for seventeen years. Although he had known Hamblin for a number of years, he had not seen him for some time until Hamblin began residing at Jody Farra's house. Hamblin asked the defendant to take some drugs to California, but the defendant refused. The defendant testified that the extent of Hamblin's business with him was Hamblin's purchase of a boat from the defendant, which the two worked on several times and for which Hamblin never finished paying. Also, Hamblin helped set up the defendant's computer in 1998, fixed problems with the computer, and installed software on it.

The defendant testified that his truck routes ran between the South and the West Coast, and he would typically haul merchandise for K-Mart. He testified that, en route, he would encounter 30 or 40 checkpoints where drug-sniffing dogs were employed. The defendant testified that he had not been to Mexico since he was sixteen years old.

On December 21, 1999, after Hamblin's house had been searched, the defendant met with him and agreed to loan him $4,500. The defendant testified that Hamblin asked if he could leave some Christmas packages at the defendant's house.

The defendant testified that the tape-recorded phone calls had been the result of Hamblin's request that the defendant speak with Hamblin on the phone and "act like his boss." Apparently, according to the defendant, the ruse was intended in some way to mislead Hamblin's Mafia associates. The defendant testified that after the second call, he became suspicious about the Christmas presents, opened the end of one, and when he felt bricks inside and smelled marijuana, he re-sealed it.

The defendant testified that the $20,000 Hamblin brought to the defendant's house on December 29, 1999 included the $4,500 Hamblin owed the defendant, and the rest was money Hamblin wanted the defendant to hold for him. The defendant testified that he found the plastic boxes in a field behind a Pilot truckstop and that he used the scales in the house to weigh silver and reloads for shotgun cartridges. The defendant testified that he had been collecting guns since he was a teenager and that he had purchased the cigarette roller eighteen years earlier for his personal use. The defendant testified that the officers found no Christmas wrapping paper in his home that matched the paper on Hamblin's packages, that he had probably thrown away the keyboard box, that anyone could have retrieved the box, that Hamblin had spent time alone in the defendant's house, and that the defendant did not own a heater matching one of the boxes in the packages. The defendant denied owning the black bag found in Mayo's residence and denied that the note in the bag contained his handwriting.

Following the defendant's testimony on June 30, 2001, the court adjourned the trial until the morning of July 2, 2001. The court officer stated on the record that, during the weekend recess, four jurors were allowed to play tennis at the hotel, under supervision. One of the supervising officers informed the court officer that one of the jurors reported that the defendant, riding in a silver Honda, had taken his picture while the juror was on the tennis court. The supervising officer, who

was present at the tennis court, testified that the car was driven by a light-haired female. The officer did not see the passenger. She indicated that a juror reported seeing the flash of a camera coming from the car's interior. The defendant denied approaching the hotel where the jury was billeted. Prosecuting counsel informed the trial court that the defendant's parents had been driving a champagne-colored Honda to court. The defendant's mother and step-father then testified that they owned a champagne-colored Honda but that the car stayed parked all weekend and was not near the jury's hotel. After the jury returned its verdicts, the court examined two jurors who were at the tennis court. Although they believed that the defendant had taken the picture, they affirmed that their respective votes were based on the evidence presented at trial. They denied that the picture-taking incident affected their verdict.

The jury convicted the defendant of possession of more than 300 grams of cocaine with intent to sell (count 10), possession of more than ten pounds of marijuana with intent to sell (count 11), the sale of more than 300 grams of cocaine (count 12), the sale of more than ten pounds of marijuana (count 13), conspiracy to sell or deliver more than 300 grams of cocaine (count 14), and conspiracy to sell or deliver more that ten pounds of marijuana (count 15).[2] After conducting a sentencing hearing, the trial court imposed the following judgments:

Count 10 – possession of cocaine with intent to sell – 22 years;
Count 11 – possession of marijuana with intent to sell – 3 years, concurrent with count 10;
Count 12 – sale of cocaine, not sentenced; conviction merged into count 10;
Count 13 – sale of marijuana, not sentenced; conviction merged into count 11;
Count 14 – conspiracy to sell cocaine – 22 years, consecutive to count 10;
Count 15 – conspiracy to sell marijuana – one year, six months, concurrent with count 10.

All sentences were imposed within Range I, and the defendant's effective sentence is 44 years in the Department of Correction.

I. Sufficiency of the Evidence.

Defendant challenges the sufficiency of the convicting evidence. A criminal conviction may be set aside for insufficiency of the evidence only when the appellate court finds that the evidence is insufficient beyond a reasonable doubt to support the finding of guilt by the trier of fact. Tenn. R. App. P. 13(e). "A jury verdict, approved by the trial court, accredits the testimony of the witnesses for the state and resolves all conflicts in favor of the state's theory." *State v. Price*, 46 S.W.3d 785, 818 (Tenn. Crim. App. 2000), *perm app. denied* (Tenn. 2001); *see State v. Hatchett*,

[2] Only counts ten through fifteen of the indictment pertained to the defendant.

560 S.W.2d 627, 630 (Tenn. 1978). Following the conviction, the appellate court reviews the evidence in the light most favorable to the state and affords the state the benefit of all inferences that may be reasonably drawn from the evidence. *State v. Cabbage*, 571 S.W.2d 832, 836 (Tenn. 1978). This means that issues of the credibility of witnesses and the weight to be ascribed to their testimony are matters entrusted to the trier of fact and are not issues for appellate analysis. *Price*, 46 S.W.3d at 785.

Moreover, a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt. *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973); *Anglin v. State*, 553 S.W.2d 616, 620 (Tenn. Crim. App. 1977). Thus, the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact beyond a reasonable doubt. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

In the instant case, the defendant challenges sufficiency of the evidence for all counts for which he received convictions. However, with respect to the conspiracy counts, the defendant limits argument to challenging the "uncorroborated" testimony of Jonathan Hamblin and does not assail any specific evidentiary component of the state's proof on the conspiracy counts.

a. Possession of more than 300 grams of cocaine for resale and possession of more than ten pounds of marijuana for resale.

The defendant challenges possession of more than 300 grams of cocaine for resale and possession of more than ten pounds of marijuana for resale. The essential elements for these offenses are that (1) the defendant knowingly possessed cocaine/marijuana and (2) the defendant intended to sell the cocaine/marijuana. Tenn. Code Ann. § 39-17-417(a) (Supp. 2002). Possession of more than 300 grams of cocaine for resale pursuant to Code section 39-17-417(j)(5) is a Class A felony. In addition, possession of more than ten pounds of marijuana for resale pursuant to Code section 39-17-417(g)(2) is a Class D felony.

The term "possession" embraces both actual and constructive possession. *State v. Cooper*, 736 S.W.2d 125, 129 (Tenn. Crim. App. 1987). In order for a person to "constructively possess" a drug, that person must have "'the power and intention at a given time to exercise dominion and control over . . . [the drugs] either directly or though others.'" *Id.* (quoting *State v. Williams*, 623 S.W.2d 121, 125 (Tenn. Crim. App. 1981)). Additionally, "it may be inferred from the amount of a controlled substance or substances possessed by an offender, along with other relevant facts surrounding the arrest, that the controlled substance or substances were possessed with the purpose of selling or otherwise dispensing." Tenn. Code Ann. § 39-17-419 (1997).

In the light most favorable to the state, the evidence reveals that immediately prior to arrest, the defendant was in possession of and had control of 862.6 grams of cocaine and over 50 pounds of marijuana. Moreover, in the days preceding the defendant's arrest, law enforcement officers monitored two telephone calls particularizing details of the impending sale. Furthermore, during the execution of a search warrant at the defendant's home, law enforcement officials found

several plastic tubs with lids, some of which contained marijuana residue. They also found 20 ziplock bags containing marijuana, sets of scales, and drug paraphernalia. The jury's choice to accept this evidence is warranted by the record. We therefore conclude that the evidence is sufficient to sustain convictions of the offenses of possession with intent to sell cocaine and possession with intent to sell marijuana.

b. Sale of more than 300 grams of cocaine and more than ten pounds of marijuana.

The defendant also challenges his convictions for a sale of more than 300 grams of cocaine and a sale of more than ten pounds of marijuana. To convict the defendant of the sale of cocaine/marijuana, the state must prove that the defendant knowingly sold the controlled substance. Tenn. Code Ann. § 39-17-417 (Supp. 2002). A sale of more than 300 grams of cocaine is a Class A felony. *Id.* 39-17-417(j)(5). In addition, a sale of more than ten pounds of marijuana is a Class D felony. *Id.* 39-17-417(g)(2).

The facts of this case prove beyond a reasonable doubt that the defendant participated in the sale of cocaine and marijuana. In *State v. William (Slim) Alexander*, No. 01C01-9302-CR-00063, slip op. at 4 (Tenn. Crim. App., Nashville, Mar. 24, 1994), this court adopted the general definition of "sale" found in *Black's Law Dictionary* 1200 (5th ed. 1979) as "a contract between two parties by which the seller, in consideration of the payment or promise of payment of a certain price in money, transfers to the buyer the title and possession of the property." *William (Slim) Alexander*, slip op. at 4. According to this definition, a sale consists of two broad components: a bargained-for offer and acceptance, and an actual or constructive transfer or delivery of the items. *Id.*

In this case, on at least two occasions the defendant and a police informant discussed terms and conditions of a sale including quantity and cost. The police informant went to the defendant's home on December 29, 1999, with $ 20,000 to consummate the transaction. One and one-half hours later the police informant exited the defendant's home with the defendant and three packages. The packages were placed in the informant's car, and he left the residence. It was later determined these packages contained large amounts of drugs. The defendant retained the money.

The defendant knowingly accepted payment or a promise for payment in exchange for drugs. *See State v. David Henning*, No. 02C01-9404-CC-00079, slip op. at 5 (Tenn. Crim. App., Jackson, Oct. 26, 1994) (one who exchanges payment in exchange for property is involved in a sale). Furthermore, the defendant helped deliver the drugs to the informant's car. The defendant's actions satisfy the two broad requirements of a "sale." *See William (Slim) Alexander*, slip op. at 4. Thus, we find that a rational trier of fact could conclude beyond a reasonable doubt that the defendant knowingly sold cocaine and marijuana on December 29, 1999.

c. Conspiracy to sell or deliver more than 300 grams of cocaine and conspiracy to sell ten pounds or more of marijuana.

Finally, the defendant challenges the sufficiency of the evidence regarding the

convictions of conspiracy to sell or deliver 300 grams or more of cocaine and conspiracy to sell ten pounds or more of marijuana. Conspiracy requires that two (2) or more people, each having the culpable mental state required for the offense which is the object of the conspiracy and each acting for the purpose of promoting or facilitating commission of an offense, agree that one (1) or more of them will engage in conduct which constitutes the offense. Tenn. Code Ann. § 39-12-103(a) (1997). However, a person who conspires to commit a number of offenses is only guilty of (1) one conspiracy so long as such multiple offenses are the object of the same agreement or continuous conspiratorial relationship. *Id.* § 39-12-103(c) (1997).

To prove the existence of a conspiratorial relationship, the state may show that a "mutual implied understanding" existed between the parties. *State v. Shropshire*, 874 S.W.2d 634, 641 (Tenn. Crim. App. 1993). The conspiracy need not be proved by production of an official or formal agreement, in writing or otherwise. *Id.* The conspiracy may be demonstrated by circumstantial evidence and the deportment of the participants while undertaking illegal activity. *Id.* Conspiracy connotes harmonization of design, not coequal participation in the minutia of every criminal offense. *Id.*

The defendant complains that his conspiracy convictions cannot stand because they are premised entirely upon the uncorroborated testimony of Hamblin, an accomplice. In Tennessee, a conviction may not be based upon the uncorroborated testimony of an accomplice. *State v. Bigbee*, 885 S.W.2d 797, 803 (Tenn. 1994). An accomplice is an individual who knowingly, voluntarily and with common intent participates with the principal offender in the commission of an offense. *State v. Lawson*, 794 S.W.2d 363, 369 (Tenn. Crim. App. 1990). When the facts are undisputed regarding a witness's participation in the crime, whether he is an accomplice is a question of law for the trial court. *State v. Perkinson*, 867 S.W.2d 1, 7 (Tenn. Crim. App. 1992). However, when the facts are disputed or susceptible to different inferences, the determination of whether the witness is an accomplice is a question for the jury. *Conner v. State*, 531 S.W.2d 119, 123 (Tenn. Crim. App. 1975). Also, the jury determines whether an accomplice's testimony has been sufficiently corroborated. *Pennington v. State*, 478 S.W.2d 892, 898 (Tenn. Crim. App. 1971). The general rule is that

> there must be some fact testified to, entirely independent of the accomplice's testimony, which, taken by itself, leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it; and this independent corroborative testimony must also include some fact establishing the defendant's identity. This corroborative evidence may be direct or entirely circumstantial, and it need not be adequate, in and of itself, to support a conviction; it is sufficient to meet the requirements of the rule if it fairly and legitimately tends to connect the defendant with the commission of the crime charged. It is not necessary that the corroboration extend to every part of the accomplice's evidence. The corroboration need not be conclusive, but it is sufficient if this evidence, of itself, tends

> to connect the defendant with the commission of the offense, although the evidence be slight and entitled, when standing alone, to but little consideration.

Hawkins v. State, 4 Tenn. Crim. App. 121, 133, 469 S.W.2d 515, 520 (1971) (citations omitted).

Unquestionably, Hamblin was an accomplice in drug trafficking during most of the conspiracy period identified in the indictment, June 1 through December 29, 1999. Although the trial court did not instruct the jury that Hamblin was an accomplice, the court instructed the jury fully on the law of accomplice corroboration and charged it to make the requisite fact determinations. The evidence is sufficient to support the jury's determination, that Hamblin's testimony was corroborated.

A task force officer testified that, during the conspiracy period, undercover operations had ensnared Hamblin and Mayo in the distribution of drugs and found a cache of drugs, including a large quantity of marijuana, in Mayo's residence and cash in Hamblin's residence. The defendant's actions before and through December 29, 1999, corroborate Hamblin's claim of a drug-trafficking relationship with the defendant. The defendant engaged in two tape-recorded, drug-deal-making telephone conversations with Hamblin. The conversations suggest the participants' familiarity with the subject matter. Hamblin told an officer that Hamblin needed to pay the defendant $20,000 for the drug lot that Hamblin had earlier received from the defendant, and the defendant accepted the cash. Hamblin testified that the defendant hauled drugs in his truck, and other evidence showed that the defendant possessed plastic bins that contained residue of marijuana and that the defendant's truck had a storage compartment that was large enough to accommodate the bins. In short, the evidence as a whole corroborates Hamblin's claim that he and the defendant conspired to sell and deliver cocaine and marijuana.

The evidence established that the defendant is guilty of conspiring to sell cocaine and marijuana. The testimony of Hamblin and other state's witnesses, apparently accredited by the jury, overwhelmingly established the defendant's guilt. We will not revisit the issues of witness credibility, and because the evidence undergirds the jury's findings, we may not disturb those findings on appeal. *Price*, 46 S.W.3d at 785.

II. Jury Instruction.

The defendant challenges the jury instructions in three respects. First, he complains that the trial court erroneously failed to instruct the jury as to the time frames of the conspiracies as alleged in the indictment. Second, he complains that the trial court erroneously omitted a "buyer-seller" charge. Last, he insists that the trial court erred in failing to instruct the jury on facilitation as a lesser-included offense of each of the charged offenses. We address these issues separately.

a. Conspiracy time frame instruction.

The claim that the trial court erred in failing to instruct the jury as to the time frame of the conspiracies as alleged in the indictment is waived. The defendant did not object to the omission of the conspiracy time frame from the jury instructions. "[A]lleged omissions in the charge must be called to the trial judge's attention at trial or be regarded as waived." *State v. Haynes*, 720 S.W.2d 76, 85 (Tenn. Crim. App. 1986); *see* Tenn. R. Crim. P. 30(b). Furthermore, the defendant did not raise the issue in his motion for new trial. This omission precludes consideration of the issue on appeal. Tenn. R. App. P. 3(e). Additionally, the defendant in his brief failed to cite to legal authority for his claim that the trial court had a duty to instruct the jury as to the alleged conspiracy time frames. Not only does this failure implicate another basis for waiver, *see* R. Tenn. Ct. Crim. App. 10(b) (mandating waiver of appellate issues not supported by citation to authorities), but it also suggests the absence of a legal basis for noticing the claim as plain error, *see* Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 13(b).

b. Buyer-seller instruction.

The complaint that the trial court erroneously omitted a "buyer-seller" instruction is also waived. By "buyer-seller" instruction, the defendant presumably means the jury should have been instructed that a mere buyer-seller relationship does not equate to a conspiracy. However, the defendant made no objection to the omission of the charge. *See Haynes*, 720 S.W.2d at 85. Also, the issue was not raised in the motion for new trial. Tenn. R. App. P. 3(e). The issue is waived.

c. Lesser-included offense.

Next, we review the claim that the trial court committed reversible error in declining to instruct the jury on facilitation as a lesser-included offense of each of the charged offenses. To be sure, the trial court, presumably based upon Mr. Hamblin's involvement in the conspiracy charges, instructed the jury on the statutory law of complicity as a mode of committing the charged crimes. *See* Tenn. Code Ann. § 39-11-402 (1997). Facilitation of a felony offense, however, is knowingly furnishing substantial assistance in the commission of a felony while knowing that another intends to commit the specific felony. *Id.* § 39-11-403(a) (1997). It is punishable in an offense class next below the facilitated felony. *Id*. § 39-11-403(b). As such, facilitation is a lesser-included offense when the accused is not the active malefactor involved in the crime. *State v. Burns*, 6 S.W.3d 453, 467 (Tenn. 1999).

This claim of failing to charge a lesser-included offense also is waived. The defendant failed to raise the claim in his motion for new trial. *See* Tenn. R. App. P. 3(e); *State v. Drini D. Xhaferi*, No. M2000-01758-CCA-R3-CD, slip op. at 4 (Tenn. Crim. App., Nashville, Mar. 7, 2002), *perm. app. denied* (Tenn. 2002); *State v. Treva Dianne Green*, No. E1999-02204-CCA-R3-CD, slip op. at 13 (Tenn. Crim. App., Knoxville, Dec. 14, 2000).

Moreover, we see no basis for noticing the absence of a facilitation charge as plain error. *See* Tenn. R. Crim. P. 52(b). The possession and sale offenses are based upon the defendant's possession and transfer of controlled substances on December 29, 1999, when Mr. Hamblin was acting as an undercover informer. As such, we believe that Mr. Hamblin was not an accomplice at that time. "Where informers or agents, under the direction of public authorities, continue to act with their guilty confederates until the matter can be so far advanced and matured as to insure the conviction and punishment of such confederates, the informers are not accomplices." *Halquist v. State*, 489 S.W.2d 88, 94 (Tenn. Crim. App. 1972). In the absence of an accomplice in the crimes of December 29, 1999, we fail to see how the defendant could have been guilty of facilitation. Even if facilitation should have been charged as a lesser-included offense of these possession and sale offenses, error in failing to give the instruction would have been harmless beyond a reasonable doubt. In short, the failure to give the instruction merits no plain-error treatment. *See State v. Allen*, 69 S.W.3d 181, 187-89, 91 (Tenn. 2002).

We also see no basis for treating as plain error the failure to instruct on facilitation as a lesser-included offense in each of the conspiracy charges. In addition to Hamblin's testimony, the defendant's active, leading role in the conspiracy was shown by circumstantial evidence. The evidence included tape-recorded telephone conversations in December 1999 wherein Hamblin asked the defendant about pricing a drug shipment, and the defendant made the final decision. Circumstantial evidence showed that the defendant brought controlled substances into Sullivan County in large quantities. A large sum of cash flowed from Hamblin to the defendant. In his home, the defendant repackaged large bricks of marijuana and large quantities of cocaine into smaller quantities for resale; he was apparently in the process of repackaging marijuana when the search warrant was executed. Based upon overwhelming direct and circumstantial evidence that the defendant was supplying large quantities of marijuana and cocaine to Hamblin, we believe that the failure to instruct the jury on facilitation of conspiracy would have been harmless beyond a reasonable doubt, and hence the failure to give the instruction merits no plain-error treatment. *See Allen*, 69 S.W.3d at 191. ("When a lesser-included offense instruction is improperly omitted, we conclude that the harmless error inquiry is the same as for other constitutional errors: whether it appears beyond a reasonable doubt that the error did not affect the outcome of the trial.").[3]

III. Double Jeopardy.

The defendant contends that the trial court erred by convicting him and imposing sentences on both conspiracies.[4] He claims that double jeopardy principles preclude treating the

[3] Because the issue at hand is resolved on the basis of waiver, we express no opinion as to whether facilitation *can be* a lesser-included offense of a two-person conspiracy.

[4] We note that the trial court properly merged the respective sales and possession charges into single convictions for each form of drug so as not to offend double jeopardy. *See State v. Williams*, 623 S.W.2d 121, 125 (Tenn. Crim. App. 1981) (holding double jeopardy bars convictions of both possession with intent to distribute and of sale of a (continued...)

plan to sell two types of controlled substances – cocaine and marijuana – as more than one conspiracy.

> The Double Jeopardy Clause[s] of both the United States and Tennessee Constitutions state[] that no person shall be put in jeopardy of life or limb for the same offense. U.S. Const. amend. 5; Tenn. Const. art. I, § 10. The clause has been interpreted to include the following protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."

State v. Price, 46 S.W.3d 785, 824 (Tenn. Crim. App. 2000) (citation omitted). The present case involves a double jeopardy claim based on multiple punishments for the same offense.

A key issue in determining double jeopardy questions is "'whether the legislature intended cumulative punishment.'" *State v. Godsey*, 60 S.W.3d 759, 777 (Tenn. 2001) (quoting *State v. Blackburn*, 694 S.W.2d 934, 936 (Tenn. 1985)). In the present case, the legislature has spoken clearly in the statute proscribing conspiracy:

> If a person conspires to commit a number of offenses, the person is guilty of only one (1) conspiracy so long as such multiple offenses are the object of the same agreement or continuous conspiratorial relationship.

Tenn. Code Ann. § 39-12-103(c) (1997). Given this clear legislative mandate, multiple convictions of conspiracy may not stand in the present case, as the state on appeal concedes. The evidence of the conspiracy established that the defendant and Hamblin conspired to sell both cocaine and marijuana, and these multiple offenses were the object of the same agreement.

Accordingly, we merge the two conspiracy convictions, leaving the defendant with a single conviction of conspiracy to sell or deliver 300 grams or more of cocaine. The conviction of and sentence for conspiracy to sell marijuana is vacated. *See State v. Ducker*, 27 S.W.3d 889, 893 (Tenn. 2000) ("Tennessee merger law, however, mandates that dual convictions of both a greater offense and its lesser-included offense merge, thereby vacating the conviction for the lesser-included offense.")

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[4](...continued)
controlled substance). The merger avoids a claim that the respective possession and sale convictions offend principles of double jeopardy. *See, e.g., State v. Conway*, 77 S.W.3d 213, 217 (Tenn. Crim. App. 2001); *State v. Price*, 46 S.W.3d 785, 824-25 (Tenn. Crim. App. 2000).

We also note that in his recitation of issues, the defendant claimed double jeopardy principles were violated upon the entry of convictions of conspiracy to sell drugs and convictions of the underlying drug possession offenses. This issue was not briefed and is, therefore, waived. Tenn. R. Ct. Crim. App. 10(b).

IV. Evidentiary Issues.

The defendant's brief obliquely raises three evidentiary issues: (1) The trial court erred in declining to suppress the fruits of the searches of the defendant's house and of his storage unit, (2) the court erroneously admitted the perjurious testimony of Hamblin, and (3) the trial court erred in admitting the controlled-substance evidence given a break in the chain of custody of such evidence.

Although the defendant assigns as error these evidentiary rulings, his brief contains no argument except for brief mention of the issues in his argument on the sufficiency of the evidence. The argument of these issues is deficient in citing to legal authority and to the appellate record. *See* R. Tenn. Ct. Crim. App. 10(b). For these reasons, these issues are waived. *See id.*

V. Jury Influence and Removal of a Juror.

The defendant argues that the judge should have declared a mistrial upon discovering that two jurors believed that the defendant took their photograph during pendency of the trial. In Tennessee, when extraneous prejudicial information is introduced to the jury, the validity of its verdict is called into question. *State v. Parchman*, 973 S.W.2d 607, 612 (Tenn. Crim. App. 1997).

A juror is prohibited from testifying about anything occurring in deliberations, including thought processes and emotions involved in his or her vote. Tenn. R. Evid. 606(b); *see State v. Blackwell*, 664 S.W.2d 686, 689 (Tenn. 1984). Nevertheless, jurors are permitted to "testify on the question of . . . whether any outside influence was improperly brought to bear upon any juror." Tenn. R. Evid. 606(b).

If it can be shown that one or more jurors were subjected to outside or improper influence, a rebuttable presumption of prejudice arises, the burden of proof shifts, and the state must substantiate the conduct or establish its harmless nature. *Parchman*, 973 S.W.2d at 612.

The record in this matter reveals that during trial two jurors believed they saw the defendant take their picture at the hotel where the jury was sequestered. There were also two officers present during the incident in question. Officer Delp testified to seeing a car being driven by a female approach her location. She did not see a camera, but a juror immediately told her that he noticed a flash. Upon hearing this information, Officer Delp contacted her superior and unhesitatingly secured the jurors in their rooms.

Officers immediately divulged this information to the court, and the court held an evidentiary hearing. During the evidentiary hearing, it came to light that the defendant's mother and stepfather owned a car similar to the car seen at the jurors' hotel. Both jurors confirmed to the judge that although they wholeheartedly believed the defendant took their photograph,

evidence presented at trial was the sole basis for their decision to convict. Upon conclusion of the hearing, the judge was convinced that the defendant had not been prejudiced.

The trial judge, as opposed to this court, is in the optimum position to make determinations regarding any perceived prejudice to the defendant. *State v. Young*, 866 S.W.2d 194, 196 (Tenn. Crim. App. 1992). Moreover, the trial judge is the person most fitting to discern repercussions throughout the jury. *Id.* The findings of the trial judge following an evidentiary hearing are accorded weight of a jury verdict unless the evidence preponderates against the findings. *Id.* at 197; *State v. Killebrew*, 760 S.W.2d 228 (Tenn. Crim. App. 1988). The evidence does not preponderate against the findings in this case. Furthermore, we are disinclined to invade trial judges' traditionally broad purview of jury management.

Furthermore, if the defendant invited, waived, or failed to take affirmative steps to rectify an error, we shall not grant relief on appeal. Tenn. R. App. P. 36(a) Advisory Comm'n Comments. After extensive review of the record, we discern a notable absence of any objection or motion for a mistrial made by defense counsel. Up and until the motion for a new trial hearing, the only meaningful discourse regarding juror influence was the confluence of counsel acknowledging satisfaction with the jurors' elucidation of their verdicts. During the motion for a new trial, defense counsel first asked the court to entertain his objection. Counsel articulated that his true desire was to object during the trial; however, the defendant staunchly impeded his objections and motions for a mistrial because the "pressure would give [the defendant] a heart attack."

Ultimately, we must reject this issue on appeal as waived. Waiver notwithstanding, the record supports the trial judge's conclusion.

VI. Variance.

The defendant claims in his brief that the proof of the dates of the conspiracies varied from the conspiracy time frame alleged in the indictment: June 1, 1999, through December 9, 1999. We are at a loss to comprehend the claim of variance in this case. Hamblin testified that he and the defendant engaged in handling drugs during the six-month period of the alleged conspiracy. Thus, we discern no basis for this assignment of error.

VII. Sentencing.

The defendant challenges the lengths of his sentences and the imposition of partially consecutive sentencing.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a *de novo* review of the record with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1997). This presumption is "conditioned upon the affirmative showing in the record that the trial court

considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). "The burden of showing that the sentence is improper is upon the appellant." *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely *de novo*. *Id.* If appellate review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In making its sentencing determination, the trial court, at the conclusion of the sentencing hearing, determines the range of sentence and then determines the specific sentence and the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors; (6) any statements the defendant wishes to make in the defendant's behalf about sentencing; and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-210(a), (b) (1997); 40-35-103(5) (1997); *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

At the sentencing hearing, the state introduced evidence of the defendant's 1987 Texas felony conviction of furnishing funds to promote the possession of more than 50 pounds of marijuana. Based upon this prior conviction and the defendant's admitted use of marijuana, a Schedule VI controlled substance, the trial court enhanced the defendant's sentences. *See* Tenn. Code Ann. § 40-35-114(2) (Supp. 2002) (sentences may be enhanced when the accused "has a previous history of criminal convictions or criminal behavior in addition to those necessary establish the appropriate range"). The court also applied the factor that the defendant was a leader in the commission of the offenses to enhance the sentences. *See id.* § 40-35-114(3) (Supp. 2002) (allowing sentence enhancement based upon accused being a "leader in the commission of an offense involving two (2) or more criminal actors"). In mitigation, the court took into consideration the 54-year-old defendant's history of military service, good work record, and education. *See id.* § 40-35-113(13) (1997) (authorizing mitigation of sentence based upon any unnamed factor consistent with the purposes of the sentencing law). The trial court announced that the enhancement factors weighed more heavily than the mitigation factors.

At 22 years, the defendant's Range I sentences for the Class A felonies of possession of more than 300 grams of cocaine for resale and conspiracy to sell cocaine are two years above the presumptive sentence of 20 years but less than the maximum of 25 years. *See* Tenn. Code Ann. § 40-35-112(a)(1) (1997) (establishing Range I, Class A range at 15 to 20 years). The three-year Class D sentence for possession of marijuana in excess of 50 pounds for resale is midway between the minimum of two and maximum of four years. *Id.* § 40-35-112(a)(4). The Class E sentence of one year, six months, is midway between the minimum of one year and the maximum of two years. *Id.* § 40-35-112(a)(5).

(a)

We find no fault with the trial court's application of enhancement factor (2) for criminal history or behavior. *See id.* § 40-35-114(2) (Supp. 2003). The defendant's criminal history bespeaks prior involvement with illicit drugs, and thus it weighs heavily as an enhancement factor.

We also discern no fault in applying enhancement factor (3) for being a leader in the conspiracy conviction. *See id.* § 40-35-114(3) (Supp. 2003). The record supports that determination. On the other hand, this factor should not have been applied to the possession and sale convictions. With respect to those convictions, the record does not support a finding that two or more criminal actors were involved. As we have explained above, Hamblin was a police agent, and not an accomplice, in the offenses of December 29, 1999. Factor (3), therefore, should not have been applied in the possession and sale convictions.

That determination notwithstanding, we believe the significant weight of enhancement factor (2) justifies the modest enhancement of the possession sentences and both factors justify the enhancement of the conspiracy sentence.

(b)

The trial judge based his order of consecutive service of the two 22-year sentences upon his finding that the defendant is a professional criminal. *See id.* § 40-35-115(b)(1) (1997) (consecutive sentences may be ordered when it is established by a preponderance of the evidence that the accused is "a professional criminal who has knowingly devoted [his] life to criminal acts as a major source of livelihood"). The defendant complains that the trial court erroneously considered the defendant's alleged money-laundering activities as indicative of his professional criminal status and that the court failed to evaluate the aggregate length of the sentence in light of the significance of the conviction crimes.

In making its decision to run the 22-year sentences consecutively, the trial court extensively analyzed the controlling statutory and caselaw considerations, and we afford its judgment the presumption of correctness. The court determined that, despite the 54-year-old defendant's long history as a commercial truck driver, the evidence at trial demonstrated "a major source of livelihood" from drug trafficking. The court relied upon Hamblin's testimony about the significant amount of cocaine and marijuana that the defendant brought into Tennessee and distributed. Hamblin testified that, during the conspiracy period, he paid the defendant between $50,000 and $60,000 for cocaine and marijuana and that the defendant used the drug money to buy, among other things, a scooter business and cars and to pay his home mortgage. Apart from Hamblin's testimony, the evidence showed that Hamblin paid the defendant $20,000

on December 29, 1999. The officers found $60,000 in cash in the defendant's storage unit.[5] Our analysis of cases in which the professional criminal factor was used as a basis for consecutive sentencing reveals that the appellate courts have typically considered the offender's age, criminal history, and constancy of regular employment. *See, e.g., State v. Andre L. Mayfield*, No. M1999-02415-CCA-R3-CD, slip op. at 17 (Tenn. Crim. App., Nashville, June 22, 2001) (affirming professional criminal consecutive sentencing of 22-year-old defendant who had four prior felony convictions and had no employment record for several years between 1992 and his arrest in present case); *State v. Harold Wayne Shaw*, No. M1999-01119-CCA-R3-CD, slip op. at 8 (Tenn. Crim. App., Nashville, Oct. 27, 2000) (reversing professional-criminal consecutive sentencing of defendant who had not been convicted of crime since 1991 and who had remained gainfully employed after leaving prison in 1993, despite prosecution's unproven claims that he was a "major drug dealer"); *State v. Michael Wilson*, No. 01C01-9602-CC-00073, slip op. at 26 (Tenn. Crim. App., Nashville, July 31, 1997) (finding no proof of professional criminal status of offenders who were too youthful to have established "much in the way of an employment history" and had no, or only scant, prior criminal records).

We glean from the cases that a defendant's record of steady, gainful employment often militates against a finding of a professional criminal status. *See, e.g., State v. Linda Culver*, No. 01C01-9503-CC-00057, slip op. at 3 (Tenn. Crim. App., Nashville, Nov. 30, 1995) (evidence unsupportive of professional criminal status when defendant was steadily employed from 1976 to the date of sentencing, the conviction offenses resulted from eight drug sales during a four-month period, and the record failed to support the trial judge's characterization of the defendant's business as a "den of iniquity"). *But see, e.g., State v. Kenneth Paul Dykas*, No. M2000-01665-CCA-R3-CD, slip op. at 15-16 (Tenn. Crim. App., Nashville, Mar. 5, 2002) (professional criminal status supported by finding "that the defendant is a transient moving from place to place and is never employed for any period of time"), *perm. app. denied* (Tenn. 2002); *State v. Terry L. Bowen*, No. 01C01-9303-CC-00076, slip op. at 17-18 (Tenn. Crim. App., Nashville, Mar. 30, 1994) (evidence supported professional criminal status for defendant who had only worked 22 months during preceding eight years).

On the one hand, the defendant's position in the present case is supported by the evidence that shows he had been a commercial truck driver for most of his adult life. Furthermore, his record evinced only one prior felony conviction. *Cf. State v. Allen Prentice Blye*, No. E2001-01375-CCA-R3-CD, slip op. at 13 (Tenn. Crim. App., Knoxville, Nov. 1, 2002) ("[T]he defendant's sparse employment history coupled with the sheer number of his prior

[5] Although the trial judge relied upon the evidence that the defendant laundered drug money through buying the scooter business, cars, and collections of guns and coins, and although the court acquitted the defendant of a money laundering charge in the instant case, this determination for purposes of consecutive sentencing is meaningless except insofar as it indicates that the defendant derived a major source of livelihood from drug sales. For this purpose, we think it matters little whether the defendant's financial activities equated to money laundering *per se*; the significance of those activities lies in their relevance to show that the ill-gotten funds were a major source of livelihood. We think that the proof at trial of these activities speaks for itself.

convictions supports a determination that he is indeed a professional criminal."), *perm. app. denied* (Tenn. 2003).

On the other hand, we glean no *per se* rule that the professional criminal factor can only apply when the defendant has essentially no means of support other than his criminal industry. Rather, the appellate court is often constrained to jettison the factor merely because the state failed to *prove* that criminal activities accounted for a major source of the defendant's livelihood. *See* Tenn. Code Ann. § 40-35-115(b) (Supp. 2002) (preponderance-of-the-evidence standard applies to establishing statutory grounds for consecutive sentencing). For instance, in *State v. Darrell M. Scales*, No. M2000-03150-CCA-R3-CD, slip op. at 10 (Tenn. Crim. App., Nashville, Jan. 11, 2002), *perm. app. denied* (Tenn. 2002), this court reversed a finding that the defendant, who had been convicted of four gambling violations, was a professional criminal. This court said,

> "The[re] is no proof in the record as to the amounts of money the Defendant wagered, and no proof that he actually won any money at his gambling attempts. . . . There is simply no proof in the record that the Defendant obtained a major source of his livelihood from [the] series [of criminal acts demonstrated by his various convictions].

Id. In *Harold Wayne Shaw*, the state's claim that the defendant was a "major drug dealer" was not supported by the mere proof that he "had made two (2) or three (3) drug deals about six (6) months before the [crime]." *Harold Wayne Shaw*, slip op. at 8. In *Linda Culver*, the trial judge's opinion that Culver earned her livelihood by operating a "den of iniquity" was unsupported by any actual evidence. *Linda Culver*, slip op. at 3. Conversely, in *State v. Warner Bolton*, No. 01C01-9008-CC-00187 (Tenn. Crim. App., Nashville, Apr. 4, 1991), the record contained evidence that Bolton had sold drugs on a number of occasions to government agents, as well as Bolton's admission "that his weekly income from drug sales had been as much as $264,000.00." This court held that Bolton was "clearly a 'professional criminal.'" *Id.*, slip op. at 10.

Thus, in the present case, we have not focused solely upon the fact that the defendant has maintained steady work as a truck driver. Code section 40-35-115(b)'s professional criminal factor is couched in terms of the defendant's criminal acts providing *a major* source of livelihood and not in terms of *the only*, or even *the major*, source of livelihood. In the present case, we note that the state established through the defendant's federal tax returns that his yearly taxable income through truck driving was $4,234.00 in 1998, $4,338.00 in 1996, and zero in1997, 1995, 1994, and 1993. Yet, the defendant paid his home mortgage and bought cars (including an antique Corvette), coins, motor scooters, and an extensive gun collection. He was making substantial monthly lease payments for a motor home at the time of his arrest. He also received $20,000 on December 29, 1999, in exchange for controlled substances, and his rented storage unit contained $60,000 in cash. We believe the state established through this

evidence that drug trafficking accounted for a major source of the defendant's livelihood. The trial court, therefore, properly applied the factor.

This determination does not end our inquiry, however. Our legislature has declared that a sentence shall be "justly deserved in relation to the seriousness of the offense," Tenn. Code Ann. § 40-35-102(1) (1997), and "should be no greater than that deserved for the offense committed," *id.* § 40-35-103(2) (1997). In *State v. Desirey*, 909 S.W.2d 20 (Tenn. Crim. App. 1995), this court held that an eighteen-year aggregate sentence that resulted from consecutive sentencing exceeded that which was deserved for the offense committed, despite that consecutive sentencing was justified by the terms of Code section 40-35-115(b)(1). *See id.* at 33 ("[T]he 1989 Act requires the trial court to insure that the aggregate sentence imposed should be the least severe measure necessary to protect the public from a defendant's future criminal conduct and should bear some relationship to a defendant's potential for rehabilitation."). In the present case, however, we hold that the aggregate sentence yielded by consecutive sentencing is deserved, based upon the defendant's distribution of a large amount of drugs. The possession with intent to sell a large amount of cocaine is alone a serious offense, and the aggregate sentence should be extended in view of the defendant's involvement in a pre-existing, though related, conspiracy. We hold that the 44-year sentence is not excessive and meets the standards of Code sections 40-35-102 and -103 and *Desirey*.

Thus, the trial court's consecutive sentencing order is affirmed.

We reverse and vacate the conviction in count 15, conspiracy to sell marijuana. In all other respects, the sentences and convictions are affirmed.

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JAMES CURWOOD WITT, JR., JUDGE